No. 92-603

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

BEACH COMMUNICATIONS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS BEACH COMMUNICATIONS, INC., MAXTEL LIMITED PARTNERSHIP, PACIFIC CABLEVISION, and WESTERN CABLE COMMUNICATIONS, INC.

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QUESTION PRESENTED

The Cable Communications Policy Act of 1984, which prohibits the operation of a cable television system that has not been franchised by the relevant state or local governmental authority, exempts from the definition of a "cable system" a facility that serves "only subscribers in 1 or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities uses any public right-of-way." 47 U.S.C. §522(6). The question presented is whether the Court of Appeals was correct in holding that the cable system definition violates the equal protection provision of the Fifth Amendment by artitrarily distinguishing between a facility which serves commonly owned or operated multiple unit dwellings, and a facility which serves separately owned and operated multiple unit dwellings.

LIST OF PARTIES AND RULE 29 CERTIFICATION

The parties are correctly identified in the Brief For The Petitioners. Richey-Pacific Cablevision Ltd. is the parent of Respondent Pacific Cablevision. Respondents MaxTel Limited Partnership, Beach Communications, Inc., and Western Cable Communications, Inc. have no parent companies or non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

Section 602(6) of the Cable Communications Policy Act of 1984 ("1984 Act"), 47 U.S.C. §522(6)(1988),[1] states:

> [T]he term "cable system" means a facility, . . . that is designed to provide video programming to multiple subscribers within a community, but such term does not include . . . (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way . . . .

Congress borrowed much of the language of the cable system definition from rules previously adopted by the Federal Communications Commission ("FCC"). *See* 47 C.F.R. §76.5(a)(1984).[2] Under the FCC's rules, systems meeting the cable system definition were nevertheless exempted from regulation if they served fewer than 50 subscribers. However, Congress rejected this "system size" provision as a means for imposing or exempting regulation under the 1984 Act.

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[1] Like the Government, we (1) refer to the relevant provision as subsection (6), although it now has been renumbered as subsection (7) following enactment of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Act"), and (2) use the terms "commonly-owned" and "separately-owned" to encompass the full distinction based on "common ownership, control, or management".

[2] Congress' adoption of the FCC language is curious given the difference between FCC and congressional policy. For example, the FCC defined cable systems for the purpose of imposing *federal* regulations originally aimed at protecting television broadcasters from the threat posed by cable systems. *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683 (1965). Congress' 1984 cable system definition largely imposes *local* regulation on those falling within its scope. *See* 47 U.S.C. §541(b)(1) (prohibiting operation of a cable system except pursuant to a franchise issued by the state or local franchising authority).

In contrast, Congress retained the FCC's exemption from the cable system definition for systems that served "only subscribers in one or more multiple unit dwellings under common ownership, control, or management." *Id.* The FCC originally had used this "common ownership" language to exempt "MATV" systems from federal regulation. MATV systems consist of a single roof-top antenna which receives over-the-air broadcast signals for retransmission over wires to all of the units in the multiunit buildings. Pet. App. at 12a.

Congress adopted this exemption to release satellite master antenna television ("SMATV") systems from regulatory treatment as a cable system. Congress' action followed FCC preemption of local jurisdiction over SMATV facilities covered by the "commonly-owned" exemption. *In Re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983) ("*ESCOM*"). A SMATV system uses antennas which receive both over-the-air *and* satellite-transmitted signals for distribution over wire to the residents of one or more multiunit dwellings. Pet. App. at 11a. SMATV systems usually are located wholly on the private property adjoining the buildings served. *Id.* Respondents own and operate SMATV systems. Pet. App. at 18a, n.6.

Immediately post-passage of the 1984 Act, the FCC concluded that a SMATV facility that serves only multiunit dwellings is exempt from the cable system definition as long as the facility uses no public rights-of-way. *In re Amendment Of Parts 1, 63 and 76 Of The Commission's Rules*, 104 F.C.C.2d 386, 397 (1986) *modifying* 58 Rad.-Reg.2d (P&F) 1 (1985), *aff'd in part, rev'd in part sub nom. ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). Other multichannel video distributors that make no use of the public rights-of-way, and hence also are excluded from the cable system definition, include systems in the multichannel multipoint distribution service ("MMDS")[3] and direct broadcast satellite service ("DBS").[4] J.A. at 8-11. In reliance on this decision, Respondents interconnected by wire groups of multiunit dwellings such that a single SMATV system served all of the buildings, regardless of whether the buildings were commonly or separately owned. Pet. App. at 18a, n.6.

In the rulemaking now on review, the FCC partially reversed itself and determined that the cable system definition includes only those facilities which use cable, or some other physical medium, J.A. at 9-11, located *exterior* to the building(s) being served. J.A. at 18. A SMATV system using cable to interconnect two or more buildings uses exterior cable and therefore constitutes a cable system, according to the FCC, unless it qualifies for the "private cable exemption" set forth in §602(6)(B) of the 1984 Act. J.A. at 13. A SMATV system qualifies for the exemption only if all of the buildings interconnected by wire are commonly owned, controlled, or managed, and the SMATV facility uses no public rights-of-way. J.A. at 20. In contrast, MMDS and DBS remained exempt from the cable system definition regardless of the ownership characteristics of the buildings interconnected via wireless technology, or the number of subscribers served. J.A. 6-13.

Given the impact of the transformation of their facilities from non-cable systems to cable systems, Respondents filed a Petition For Review on the grounds, *inter alia*, that the regulatory distinction between SMATV systems using wire to interconnect *commonly* owned buildings as opposed to *separately* owned buildings violated the Equal Protection Component of the Fifth Amendment.

[3] MMDS receives satellite and broadcast video signals at a common receive point, and then uses microwave technology to redistribute the signals over radio frequencies from a central transmitter to any number of receive sites equipped with microwave antennas. Pet. App. 13a.

[4] DBS transmits video programming from an orbiting satellite directly to an antenna installed at the video consumer's residence.

The United States Court of Appeals for the District of Columbia Circuit, applying the rational basis standard of review, tentatively agreed. Pet. App. at 32a. All three members of the panel, however, deemed it appropriate to remand the record to the FCC for the development of "legislative facts" to support the classification. Pet. App. at 35a - 36a; Pet. App. at 44a-45a (Mikva, C.J., concurring).

In its Report to the court, the FCC suggested that Congress imposed regulations on SMATV systems using wire to interconnect separately-owned, but not commonly-owned, buildings as a means of regulating larger systems. Pet. App. at 50a. Deciding that this did not amount to a "reasoned justification in terms of *some* public purpose," Pet. App. at 4a, the court held the cable system definition unconstitutional to the extent it required SMATV operators to obtain a franchise before interconnecting separately-owned multiunit dwellings by wire. Pet. App. at 6a.

The court invited Congress to remedy the result if necessary, Pet. App. at 6a-7a, but in the course of a substantial revision of federal cable regulation, Congress declined to do so.[5] On November 30, 1992, this Court granted the Petition For Writ of Certiorari. J.A. at 44.

SUMMARY OF THE ARGUMENT

Since passage of the 1992 Act, current congressional intent coincides with Respondents' contention and the FCC's express preference that SMATV facilities operating wholly on private property interconnecting separately-owned multiunit dwellings by wire are not cable systems. Congress declined the court of appeals' invitation to

[5]The 1992 Act places substantial new burdens on cable systems, thus exacerbating the discriminatory effect of the cable system definition on Respondents' First Amendment activities. Although the court of appeals had no opportunity to consider the validity of these restrictions, they are now before this Court. *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972).

"remedy the situation" if Congress disagreed with the lower court's ruling eliminating the discriminatory classification between SMATV operators based solely upon the ownership of the real estate served. Such congressional silence portends acquiescence, especially in light of the four-month period following the decision during which Congress substantially revised the 1984 Act and could have made its purpose known with a newly crafted exemption. *Lorillard v. Pons,* 434 U.S. 575, 580 (1978). Respondents suggest that the central issue in this case is moot, rendering the Government's appeal a request for an advisory opinion on what the conceivable basis underlying the cable system definition in the 1984 Act might have been when Congress in the 1992 Act has evidenced a different policy determination in accord with the lower court's holding.

Should congressional silence be construed in a contrary fashion, the challenged classification is subject to heightened scrutiny, as it discriminatorily imposes affirmative obligations on a particular group in the exercise of First Amendment rights. *Police Dep't of Chicago v. Mosley,* 408 U.S. 92 (1972); *Zablocki v. Redhail,* 434 U.S. 374 (1978). Those obstacles are erected by the 1992 Act as applicable to all speakers defined as cable systems. The discriminatory classification is not narrowly tailored to serve the "conceivable" legislative interest posited by the Government nor is such interest a compelling one. *Carey v. Brown,* 447 U.S. 455 (1980). Even in the absence of heightened scrutiny, the discriminatory classification is not rationally related to a legitimate governmental purpose.

The Government hypothesizes that Congress enacted the discriminatory classification to serve the interest of consumer welfare by subjecting SMATV systems of a larger size to regulatory treatment as cable systems. Smaller SMATV systems were exempted, according to the Government, because the cost of regulation outweighed the benefits and consumer leverage over systems serving

commonly-owned dwellings is greater. The Government's conceived interest is explicitly contradicted by the record, however, thus leaving the discriminatory classification bereft of any basis.

Congress' cable system definition was modeled upon the FCC's definition initially adopted in 1965. Apart from the commonly-owned exemption, the FCC's definition contained a specific exemption excluding cable systems "serv[ing] fewer than 50 subscribers." The FCC's rules also established classifications based upon the "total number of subscribers served" as a means to distinguish among cable systems for purposes of imposing graduated levels of regulatory burdens. In fashioning its own cable system definition, Congress *rejected* the "system size" exemption as well as the regulatory scheme based on the number of subscribers served. While rational basis review does not require an "articulated" purpose, the Government cannot advance a "conceivable" basis that is expressly contradicted by Congress' own policy choices. Nor can citing the "rough accommodation" litany overshadow the fact that Congress *affirmatively* elected to eliminate a mathematically precise manner of achieving the "conceived" legislative interest. Congress' refusal to regulate *directly* based on system size defeats any assertion that the *wholly independent* "commonly-owned" exemption was meant to regulate system size *indirectly*. Rather the "commonly-owned" exemption, applicable only to *MATV* systems until just prior to the 1984 Act, merely reflected the FCC's judgment that systems functioning as a common antenna "amenity" for residents of multiunit dwellings posed no threat to broadcast service, the nexus for federal jurisdiction over cable systems at that time.

The Government's "conceived" basis is similarly contradicted by Congress' decision *not* to subject larger video distributors such as MMDS and DBS to regulation as cable systems. Had Congress intended to protect consumers from being "exploited" at the hands of larger suppliers, such systems would have been included in the cable system definition. While Congress may handle a problem "one step at a time," the Government fails to explain that the "step" attributed to Congress is in the opposite direction of where federal policy is headed, *i.e.*, a long-standing fifteen year decision not to subject wireless systems to cable system regulation. Recognizing this, the Government claims the "conceivable" basis justifying the discriminatory treatment accorded wired versus wireless technologies serving separately-owned dwellings is not consumer protection, but an incentive for wired technologies to switch to a wireless format. Why Congress intended to impose regulation on larger systems and then encourage those systems to evade regulation by "switching" is unexplained, as is the fact that such reasoning opposes decades of policy expressly advocating migration away from scarce spectrum resources.

In the 1984 Act, Congress adopted a dual federal-local regulatory framework despite its policy since the inception of radio to retain exclusive jurisdiction over interstate media. The sole nexus for local regulation was the necessity for cable systems to install facilities in the public rights-of-way for the delivery of such interstate signals. Immediately prior thereto, the FCC had preempted local regulation of SMATV facilities not using public rights-of-way. The FCC's explicit rationale for preserving exclusive jurisdiction was the federal interest in promoting the "unfettered development of interstate transmission of satellite signals." *ESCOM*, 95 F.C.C.2d at 1230-31. Local regulation interfered with this open sky policy by reducing the number of satellite receive points available to consumers. *Id.* The FCC restricted its preemption without explanation to those SMATV facilities serving commonly-owned dwellings even though SMATV systems serving separately-owned dwellings advanced the same federal interest in

promoting the free flow of interstate satellite signals and made no use of public rights-of-way. Congress adopted the *ESCOM* decision which fell within the ambit of the "commonly-owned" exemption to the cable system definition, and thus unwittingly created the discriminatory classification at issue here.

Consistent with this Court's precedents, the court of appeals properly refused to uphold the challenged classification since it rests upon a feigned rather than a real difference between First Amendment speakers. The Government simply has not articulated a conceivable basis for the discriminatory classification.

ARGUMENT

I. A CASE OR CONTROVERSY NO LONGER EXISTS BETWEEN THE PARTIES SINCE CONGRESS ADOPTED THE COURT OF APPEALS' CONSTRUCTION OF SECTION 602(6) WHEN IT PASSED THE 1992 ACT.

The court of appeals invited Congress to "act to remedy the situation" if Congress determined that the majority had "misunderstood congressional intent in [its] construction of the Act and its underlying purposes." Pet. App. at 6a-7a. The court of appeals was aware of Congress' intended revision of the 1984 Act, having been advised of same by the FCC:

> The Court should be aware that significant cable legislation is before Congress now, [citation omitted], and that Congress in the context of considering that legislation will have an opportunity to revise the definitional provisions of the 1984 Act if it chooses. Some interested parties have brought the Court's decision in this case to the attention of the relevant committees and have suggested legislative language to address the equal protection question identified in the majority opinion in this case.

Pet. App. at 51a-52a. The court of appeals issued its final

decision on June 9, 1992. The 1992 Act was enacted nearly four months later on October 5, 1992. Despite full knowledge of the lower court's decision, Congress chose not to alter the language of the statutory provision nor comment in any way on the majority's holding.

Congress is certainly not reluctant to signal its disapproval of judicial decisions construing federal statutes. Where, as here, Congress had been completely silent concerning any justification for its discriminatory classification, Congress' decision to remain silent strongly suggests its agreement with the outcome below, especially in the face of explicit invitations to do otherwise if such decision were deemed at odds with congressional intent.[6] Should this Court reverse the holding below, current congressional intent *not* to subject SMATV operators interconnecting separately-owned buildings by wire to regulation as cable systems would be frustrated.

Prior to enactment of the 1992 Act, the FCC expressed its own "policy preference" *not* to treat such operators as cable systems:

> [T]he Commission in an earlier interpretation of the cable definition had taken the position that, when multiple unit dwellings are involved, a facility's use of the public right-of-way should be the sole basis for determining the facility's status as a

[6] "Congress is presumed to be aware of [ ] . . . judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. . ." *Lorillard*, 434 U.S. at 580 (citation omitted); *accord*, *Merrill Lynch Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381-82 (1982). It is especially appropriate to assume congressional adoption of judicial decisions that are "long-standing and well known . . ." *Ankenbrandt v. Richards*, 112 S.Ct. 2206, 2213 (1992). Although not "longstanding," the lower court's opinion was made known to Congress at the perfect time for Congress to respond, if such was its intent, since Congress was in the midst of making substantial changes to the 1984 Act. In this case, the *recency* of the court of appeals' opinion reinforces the presumption that Congress approved of it.

> cable system and therefore its susceptibility to local franchise regulation [citation omitted]. Under that interpretation, *which reflected the Commission's own policy preference, none of the facilities under consideration here would have been subject to franchise regulation under the Cable Act.*
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> * * *
>
> The Commission's current interpretation of the cable definition, which results in the regulatory distinctions that are challenged on equal protection grounds, was dictated by the unambiguous language of the statute, *and not by any policy determination by the FCC in support of that interpretation.*

Pet. App. at 47a, 50a-51a (emphasis added). Surely Congress knew of the expert agency's conclusion that the discriminatory classification set forth in §602(6) ran counter to FCC policy. Whatever Congress may have believed FCC policy concerning the alleged need for local regulation over such SMATV operators was prior to the 1984 Act, Congress clearly did not understand FCC policy to be the same prior to the 1992 Act. If, as the Government contends, Congress is deemed to have followed pre-1984 Act FCC policy on this issue in originally enacting §602(6),[7] it is equally true that in passing the 1992 Act Congress must have followed the FCC's *current* policy opposing treatment of such SMATV operators as cable systems.

The Government apparently assumes that Congress was powerless to alter the outcome below in claiming that "Congress has *not* acquiesced in the lower court's constitutional holding in this case." Reply Brief For Petitioners On Petition For a Writ of Certiorari, p.8, n.7. To the contrary, since Congress could have "corrected" the

[7] Respondents disagree that FCC policy prior to the 1984 Act *authorized* local jurisdiction over *SMATV* facilities operating wholly on private property and serving separately-owned multiunit dwellings via a hardwire interconnection. *See* Section IV, *infra.*

decision,[8] its failure to do so reflects an intent to codify the state of the law with respect to the regulatory treatment of SMATV systems as it existed at the time it made substantial revisions to other areas of cable legislation. *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979). It is irrational to suggest that Congress remained silent in the hopes that this Court would grant certiorari and then interpret that silence in a manner inconsistent with established precedent regarding legislative adoption of existing law, when Congress could have resolved all doubt as to the nature of the governmental interest which the challenged classification was intended to further.

In this regard, Respondents must question whether a case or controversy continues to exist in this case. There is nothing to counter the presumption that current congressional intent coincides with Respondents' contention and the FCC's preference that SMATV facilities operating wholly on private property and interconnecting separately-owned multiunit dwellings by wire are not cable systems. Whether the court of appeals actually exceeded the boundaries of this Court's precedents governing rationality review (a conclusion with which Respondents disagree) is irrelevant if the result reached has been endorsed by Congress and the expert agency charged with implementing congressional intent. In seeking review as to whether the lower court applied proper rationality review, the Government is essentially requesting an advisory opinion on what the conceivable basis underlying §602(6) in the *1984* Act

[8] For example, Congress could have crafted an exception to the definition for facilities serving fewer than a fixed number of subscribers. At a minimum, Congress could have reenacted the current provision and, in the legislative history, articulated a justification for the exemption at issue, rather than leaving it for the parties and this Court to conceive of one. *See Helvering v. Griffiths*, 318 U.S. 371, 389 (1943) ("We think if Congress had passed or intended to pass an Act challenging a well known constitutional decision of this Court there would appear at least one clear statement of that purpose either from its proponents or its adversaries.").

might have been when Congress in the *1992* Act has evidenced a different policy determination.

Respondents suggest that the central issue in this case is moot. *United States Dep't of Justice v. Provenzano*, 469 U.S. 14, 15 (1984) (per curiam) (new legislation resolving dispute renders case moot). Accordingly, Respondents respectfully request that this Court hold that SMATV operators interconnecting separately-owned multiunit dwellings by wire are not included within §602(6) and remand this case for dismissal. *Diffenderfer*, 404 U.S. at 415.

II. THE CHALLENGED PROVISION DISCRIMINATING AMONG FIRST AMENDMENT SPEAKERS IS SUBJECT TO STRICT SCRUTINY.

When a statute is challenged on equal protection grounds, this Court "must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253 (1974). At a minimum, the classification must be rationally related to a legitimate governmental interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam).

Such minimum scrutiny applies "only when no constitutional provision other than the Equal Protection Clause itself is apposite." *Id.* at 304, n.5. If the classification "significantly interferes" with the exercise of a constitutionally protected fundamental right, the statute is subject to a more demanding level of scrutiny. *Zablocki*, 434 U.S. at 388. Under the strict scrutiny test, this Court must determine whether the classification is "necessary to promote a compelling state interest." *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969). A regulation that classifies speakers on the basis of their First Amendment

activities, and then imposes affirmative obligations on only some of the classes so created, is subject to strict scrutiny. *Carey*, 447 U.S. at 461-62. In such cases, "Equal Protection . . . mandates that the legislation be finely tailored to serve substantial [governmental] interests, and the justification offered for any distinction it draws must be carefully scrutinized." *Id.*[9]

The Government does not contest the court of appeals' determination that the Respondents' equal protection challenge is ripe. Pet. App. at 32a. Ruling that the challenged classification failed to satisfy the rational basis standard of review, the lower court refrained from considering whether a heightened scrutiny equal protection challenge was ripe. Pet. App. at 32a. Yet such a heightened scrutiny challenge is ripe.[10]

A claim is ripe if "the issues tendered are appropriate for judicial review . . . ." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967). Before this Court is a classifi-

[9] *Accord Bullock v. Carter*, 405 U.S. 134, 144 (1972) (strict scrutiny applied to statute that imposed extremely high registration fees in certain primary elections, necessarily excluding some potential candidates, particularly those supported by poorer people, whose First Amendment rights were thereby implicated); *American Party v. White*, 415 U.S. 767, 780 (1974) (applying strict scrutiny to ballot access procedure applied to all political parties except those that had received at least two percent of the vote in the preceding general election since statute placed affirmative oblitations on the ability of new and small political parties to exercise First Amendment rights on an equal basis with larger, established parties which qualified for the exemption).

[10] The fact that the court of appeals found Respondents' substantive First Amendment challenge to be unripe, Pet. App. at 28a, does not diminish the ripeness of the heightened-scrutiny equal protection challenge. The lower court recognized that the cable system definition posed "a First Amendment problem" since " '[c]able television . . . is engaged in "speech" under the First Amendment,' *Leathers v. Medlock*, 111 S.Ct. 1438, 1442 (1992)." Pet. App. at 25a. Congress' imposition of First Amendment "problems" in the path of only *some* First Amendment speakers gives rise to strict scrutiny under equal protection analysis. *See infra* at 14-16.

cation that would render some of Respondents' SMATV systems illegal, subject others to burdensome local franchising restrictions such as the universal service requirement advocated by *amici*,[11] and chill Respondents' current plans to serve additional sites since to do so requires that a franchise application process be followed with no guarantee that the application will be granted.[12]

In addition, under §§3-5 of the 1992 Act, 106 Stat. 1471-77, a cable system is required to carry certain broadcast programming on its basic tier pursuant to a scheme that is very similar to previous "must carry" requirements that were twice struck down due to the "substantial First Amendment costs" they inflicted on cable operators' editorial discretion. *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1461 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988). The 1992 Act also imposes rate regulation on cable systems

[11] *See amicus* brief of National League of Cities, *et al.* at 20. Respondent Pacific Cablevision faces such universal service requirements in San Diego, California where, but for the lower court ruling, Pacific would be forced to shut down a facility which currently provides service to residents of several separately owned buildings, or seek a franchise that either would be denied, prohibiting Pacific from speaking, or granted under the condition that Pacific expend the hundreds of thousands of dollars necessary to expand its service area to match that of the existing franchised operator, covering several hundred thousand residents. Cal. Gov. Code §53066.3 (West Supp. 1990). Supp. Br. of Pet., p. 4 (filed D.C. Cir. Dec. 16, 1991).

[12] According to the Government, Congress knew that the franchise requirement imposed substantial burdens on SMATV operators since Congress exempted wireless systems as a means of encouraging video distributors to switch from wired to wireless technology. This suggests that Congress felt that the franchise requirement was so severe that a video distributor who interconnects two buildings by wire will find it worthwhile to purchase and install an entirely new distribution system to interconnect those buildings rather than endure the burdens of franchising.

that are not subject to "effective competition," 1992 Act, §3, 106 Stat. 1464, thus placing direct financial burdens on the exercise of free speech rights, and permits local authorities to deny a franchise request if the cable operator does not guarantee universal service. 1992 Act, §7, 106 Stat. 1483. *See* n.11, *supra*. The 1992 Act also dictates customer service standards, §8, 106 Stat. 1484; leased commercial access, §9, 106 Stat. 1484; cross-ownership prohibitions, §11, 106 Stat. 1486; anti-trafficking, §13, 106 Stat. 1488; minimum technical standards, §16, 106 Stat. 1490; and subscriber privacy, §20, 106 Stat. 1497. Thus, apart from creating the discriminatory classification which is ripe for equal protection analysis, Congress has also prescribed the degree of the burden to be imposed on those falling within that classification. Congress' decision to "place obstacles in the path of a [person's] exercise of . . . freedom of [speech]" must be examined with strict scrutiny when the person so burdened has been singled out by Congress for discriminatory treatment. *Regan v. Taxation With Representation*, 461 U.S. 540, 549-50 (1983) (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)).

For this reason, strict scrutiny was applied in examining a city ordinance which prohibited all picketing in the vicinity of schools, except peaceful picketing of any school involved in a labor dispute. *Police Dep't of Chicago v. Mosley*, 408 U.S. at 99. Although the regulation at issue in *Mosley* was especially repugnant to the Constitution because it was content-based, this Court recognized that strict scrutiny was applicable even if the State discriminated among speakers on bases other than the content of their speech. For example, this Court held that although "[c]onflicting demands on the same place may compel the State to make choices among potential users and uses", such "discriminations . . . must be tailored to

serve a substantial governmental interest." *Id.* at 98, 99.[13]

Strict scrutiny is applied when the classification discriminatorily imposes affirmative obligations on a particular class of persons exercising their fundamental rights. In *Zablocki,* this Court applied strict scrutiny to a statute prohibiting certain residents from exercising their fundamental right to marry without prior court approval. The restriction applied only to persons who were under a court order to provide support for children not in their custody. Strict scrutiny was appropriate given the "direct legal obstacle in the path of persons desiring to get married" that the State had created. 434 U.S. at 387, n.12. By contrast, a statute which eliminated certain Social Security benefits upon the marriage of the beneficiary did not invoke heightened scrutiny. *Califano v. Jobst,* 434 U.S. 47, 53-54 (1977).

The scope of this rule is perhaps best demonstrated by its exception. In *Maher v. Roe,* 432 U.S. 464 (1977), this Court applied the rational relationship test in a case brought by two indigent women challenging a state regulation which provided funding for childbirth, but not for non-therapeutic abortions. This Court declined to apply strict scrutiny, even though the regulation involved the indigent women's fundamental right to be free from undue interference with respect to the termination of their pregnancies, and even though the denial of benefits might mean an inability to obtain an abortion, when wealthier women would be able to do so. *Id.* at 474. As the Court held:

> The Connecticut regulation places no obstacles – absolute or otherwise – in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth. . . . The indigency that may make it difficult – and in some cases, perhaps, impossible – for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe* [*v. Wade,* 410 U.S. 113 (1973)].

Maher, 432 U.S. at 474. *See also Regan,* 461 U.S. at 549 (applying rational basis test because tax regulation restricting the ability of nonprofit entities to lobby, but containing an exemption for certain veterans' organizations, amounted to nothing more than a subsidy for the exempted organizations).

Thus, the Government's denial of the funding necessary to exercise a fundamental right usually triggers the minimal rational basis standard of review; any affirmative restrictions imposed by the Government which create, on a selective basis, new obstacles to the exercise of such a right invariably require strict scrutiny.[14] While the strict scrutiny test applies in the instant case, the discriminatory classification survives neither test.

III. CONGRESS REJECTED THE GOVERNMENT'S CONCEIVED BASIS FOR THE DISCRIMINATORY CLASSIFICATION.

A. Congress Rejected The FCC's Pre-1984 System Size Exemption To Its Cable System Definition.

Contrary to the Government's conclusion, the fact that the FCC's pre-1984 cable system definition contained

[13] Both *Mosley* and *Carey* were public forum cases. They apply with equal, if not greater force, to the cable system definition which, as construed by the Government, places an obstacle to speech on private property engaged in by a person who has been invited on the property by the property owner for the specific purpose of exercising First Amendment rights. *See Stanley v. Griffin,* 394 U.S. 557, 565 (1969).

[14] Regulations which classify speakers and speech also are subject to direct First Amendment challenges and receive rigorous scrutiny by this Court. *See, e.g., Boos v. Barry,* 485 U.S. 312 [footnote continued]

essentially the same "commonly-owned" exemption as that found in §602(6) does not buttress the Government's hypothesis that Congress enacted the discriminatory classification in order to subject systems of a larger size to regulatory treatment as cable systems. In so hypothesizing, the Government studiously avoids the fact that Congress specifically *rejected* the FCC's own additional, contemporaneous exemption expressly excluding smaller systems from regulatory burdens, and only retained the "commonly-owned" exemption.

The FCC's initial cable system definition contained the following two exemptions:

> (1) *any such facility which serves fewer than 50 subscribers*, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

First Report & Order in Docket Nos. 14895 & 15233, 38 F.C.C. 683, 741 (1965) (emphasis added). There is no discussion of the cable system definition or either of its two exemptions in the 1965 Report. The definition merely appears in the Appendix. Moreover, the 1965 Report addressed the competitive threat traditional cable systems allegedly posed to off-air television broadcasters and what *federal* regulatory response was warranted, *e.g.*, the possible imposition of mandatory signal carriage rules, not what local regulation might be permissible.

In later adopting the signal carriage and network nonduplication-syndicated exclusivity regulations proposed in the 1965 Report, the FCC's cable system definition and its two exemptions remained unchanged. *Second Report & Order in Docket Nos. 14895, 15233, & 15971,*

(1988) (regulation must be necessary to serve a compelling state interest and narrowly drawn to achieve that end); *accord, First National Bank v. Bellotti*, 435 U.S. 765, 784-86 (1978).

2 F.C.C.2d 725, 797 (1966). The definition again appears in the Appendix to the Report without explanation. The only reference to the definition in the text reads: "Excluded from these rules will be those *CATV* systems which serve less than 50 subscribers, or which serve only as an apartment-house *master antenna*." *Id.* at 764, n.32 (emphasis added). Although brief, this description of the two exemptions indicates that the "system size" exemption was intended to exclude the very smallest of cable television systems from compliance with federal regulation. However, the "commonly-owned" exemption was totally unrelated to system size; large as well as small master antenna systems were exempt from federal regulation. This exemption sought to exclude those systems which employed similar CATV technology, *i.e.*, a television antenna and coaxial cable, but which served a different *function, i.e.*, to act as a common receptor for the receipt of off-air television signals for the benefit of the residents of apartment houses where individual antennas were impractical and/or ineffective.

In 1977, the FCC undertook a comprehensive examination of its cable system definition. *First Report & Order in Docket No. 20561*, 63 F.C.C.2d 956 (1977). In retaining the "*system size*" exemption, the FCC specifically discussed its purpose in terms nearly identical to the Government's proffered justification here for the discriminatory "*commonly-owned*" classification:

> Obviously these qualifying elements [of the 'categorical exclusions' to the cable system definition] do not determine whether or not a given facility is a cable television system in a technical sense. They reflect instead certain public interest judgments made by this Commission with respect to regulating cable television systems. For instance, cable facilities serving 50 or fewer subscribers were presumed to be too small and two few in number to

> engender any realistic concern over their potential impact on local over-the-air television, either singly or in the aggregate, and thus the relative burden such systems would bear in complying with our Rules would be excessive and unnecessary. For this reason such cable facilities were exempted from our definition, not because they could not rightly be defined as 'systems', but because we had determined that it would not serve the public interest to regulate them as such.

Id. at 964. *See also id.* at 976 (50 subscriber exemption rests on "judgment that systems of this size are of minimal regulatory concern").

Equally significant, the FCC adopted rules for the first time which reduced the regulatory burdens imposed on systems between 50 and 499 subscribers. *Id.* at 981-990. In doing so, the FCC stressed that such systems are "reception only" facilities, *i.e.*, do not engage in program origination services, retransmit only local off-air, rather than distant, television broadcast signals, and are unlikely to be "injurious" to local broadcast service.[15] The FCC further inquired as to whether a like reduction in regulatory burdens ought to be applied to cable systems serving between 500 and 1000 subscribers. The FCC had already classified systems serving less than 1000 subscribers as exempt from the FCC's syndicated and network program exclusivity rules. *Id.* at 970 ("This regulatory approach is sound . . . because it protects local broadcasters from the possible adverse impact of cable carriage of duplicating signals while placing the burden of protection on those cable facilities having sufficient size to bear it."). The FCC had exempted systems with fewer than 3500 subscribers from FCC rules requiring program origination and the provision of public, educational and governmental access channels. *Id.* at 982. All of these classifications demonstrate the FCC's repeated practice of using the "total number of subscribers served" as the true measure of system size in order to distinguish among cable systems for purposes of regulatory treatment.[16] The 1977 Report, like the FCC's earlier reports, consistently justified such differential regulatory treatment on conclusions as to which systems were more likely to pose a competitive threat to local broadcast stations.

[15]The FCC had solicited comment on whether systems with fewer than 250 subscribers might not be deserving of total exemption from FCC rules for similar reasons. 63 F.C.C.2d at 976.

It was within this environment that Congress first stepped in to provide a comprehensive federal program for the treatment of cable systems. While the FCC had employed the cable system definition solely to determine which interstate facilities would be subject to federal regulation as cable systems, Congress adopted its definition to control which interstate facilities would be subject to dual federal-local regulation. A simple comparison of the cable system definition adopted by Congress in the 1984 Act (Section 602(6)) and the FCC's cable system definition existing at the time of passage (47 C.F.R. §76.5(a) (1984)) demonstrates that Congress specifically rejected "system size" as a regulatory tool for either federal or local regulation. Congress did *not* retain the FCC's exemption for systems serving fewer than 50 subscribers. Any system meeting the definition of a cable system was subject to both the federal and local regulation established in the Act no matter how small. Congress also did not retain the various classifications adopted in the 1977 Report applying reduced regulatory burdens to cable systems depending on the number of subscribers served.

[16]"[W]ith the creation of different classes of systems based on total number of subscribers served, it has become most important for regulatory purposes that our records reflect *as accurately as possible the size* of each system in its entirety." 63 F.C.C.2d at 973-74 (emphasis added).

These congressional actions alone rebut the Government's unsubstantiated assertion that Congress' retention of the *wholly independent* "commonly-owned" exemption was meant to regulate *indirectly* what Congress chose not to regulate *directly, i.e.*, cable systems based on "system size" distinctions. While, for purposes of rational basis scrutiny, the Government need not provide empirical proof or an articulated legislative purpose for the discriminatory classification, the Government cannot advance "conceivable" bases that are expressly contradicted by Congress' own policy choices. Such contradiction renders such conceivable bases inconceivable. And while, for purposes of rational basis scrutiny, the Government need only show a "rough accommodation" underlying congressional classifications, there is a substantial difference between a rough accommodation where Congress is silent on the issue and an *affirmative* election by Congress to eliminate a mathematically precise manner of achieving the legislative purpose advanced by the Government. That rejection defeats any notion that the legislative purpose for the cable system definition was to draw a line between smaller and larger systems for application of federal and local regulation.[17]

B. The Co-existence Of The System Size And Commonly-Owned Exemptions Proves The Latter Was Unrelated To System Size Considerations

A tandem argument the Government ignores is why the FCC would have had two exemptions to accomplish the same purpose, *i.e.*, to exempt smaller systems from regulation, or why the FCC would not have incorporated

[17] The Government's admission that the classification is a "rough accommodation" and that a *direct* "system size" exemption would constitute a more precise means of achieving regulation of larger systems, Br. at 24-25, virtually concedes that the discriminatory classification cannot withstand strict scrutiny review were this justification to be accepted by this Court.

MATV systems within the classifications keyed to reduced regulatory burdens depending upon the total number of subscribers served. The FCC's 1977 Report clearly establishes that the "commonly-owned" exemption had nothing to do with subjecting only larger cable systems to regulation, but rather applied to small and large systems alike. Such systems had become known not as "small" CATV systems but as MATV systems.[18]

In retaining the "MATV exemption" "*regardless of the size or function performed*", *id.* at 991 (emphasis added), the FCC emphasized that federal regulation of MATV systems had not been "justified on grounds of their actual or potential harm to over-the-air television." *Id.* at 996.[19] Since federal regulation over CATV was tailored to rules protecting local broadcasters, application of such rules to MATV systems not viewed as endangering the broadcast service was unnecessary. The purpose of the "commonly-owned" exemption was simply a deregulatory one; the FCC had no interest in regulating MATV systems, no matter what their size, whose function was simply to serve as a common antenna for multiunit dwellings:

> What we seek to establish are concepts of "amenity", convenience and even feasibility which serve

[18] In that proceeding, the FCC even debated whether larger "over 1000 unit" MATV systems under common ownership should be exempt from federal regulation. Such debate did not center on whether consumers were more likely to have sufficient bargaining power over landlords that they could influence the conduct of such systems, but rather over whether such systems functioned to provide services beyond the passive reception of local off-air signals, thus potentially threatening the survival of local broadcast stations. 63 F.C.C.2d at 991. The FCC clearly *rejected* system size as a regulatory tool for MATV as opposed to CATV.

[19] The FCC did however alter the language of the exemption, substituting the term "multiple unit dwellings" for "apartment dwellings." This revision merely clarified the scope of the MATV exemption, insuring its applicability to multiunit dwelling facilities but not facilities serving single family homes. 63 F.C.C.2d at 996.

> to set excluded facilities apart from regulated (cable) facilities. By amenity we mean a lessor's or a manager's use of master antenna service as a secondary or incidental inducement to occupancy of his residential facility. By convenience, we are suggesting the efficiency and economy, even the aesthetics, of having a single, shared receptor rather than a forest of antennas on the roof of a multiple unit dwelling. By feasibility we refer to the realities of a television signal's shadowing and blocking when it must travel among highrise buildings, making a tall antenna . . . the only means of receiving service. Under such circumstances the erection of a high master antenna becomes not a competitive entry into something like cable television service but an almost necessary improvement to the business of leasing or selling dwellings.

Id. at 997.

The 1977 Report does not discuss whether MATV systems ever served separately, as opposed to commonly, owned multiunit dwellings. If such systems existed, the FCC proffers no rationale for distinguishing between them for regulatory purposes. If such systems did not exist, then the classification was not meant to be discriminatory at all; it would simply have been intended to be an accurate description of the function of all MATV facilities, *i.e.*, antenna service to commonly owned dwellings.[20]

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[20] While the FCC was also silent with respect to whether any nexus existed for local regulation over MATV systems, the FCC had specifically questioned such authority over MATV systems not using the public rights-of-way in its earlier notice:

> There are, of course, differences as well as similarities [between CATV and MATV] which would have to be recognized in any rules adopted. *Because no use is made of local rights-of-way, for example, such [MATV] systems would rarely be required by local laws to obtain a franchise before commencing operation.*

[footnote continued]

Less than a year later, the FCC reaffirmed these decisions. *Memorandum Opinion & Order in Docket No. 20561*, 67 F.C.C.2d 716 (1978). Rejecting arguments that MATV systems should be regulated because of an alleged competitive threat to *cable television* rather than broadcast television, the FCC reiterated that its central purpose in imposing regulation at all upon cable systems was preservation of free, off-air broadcast service:

> Our original definition of a cable television system . . . recognized "MATV" systems as a *different entity for regulatory purposes* and, accordingly, contained a specific exception for such systems. . . . [N]ot only did we feel that MATV systems were substantially different from traditional cable television systems so as to justify continued exemption from our regulations but we also were strongly impressed by the argument that none of the . . . parties *demonstrated actual or potential harm to over-the-air broadcasting by existing MATV systems — a nexus of our jurisdiction over cable systems.*

Id. at 725 (emphasis added). Having no regulatory nexus, the FCC refused to encompass MATV systems within the regulatory classifications established for cable systems on the basis of the total number of subscribers served.[21]

Notice of Proposed Rulemaking in Docket No. 20561, 54 F.C.C.2d 824, 835 (1975) (emphasis added).

[21] The Government emphasizes a single paragraph out of all the pre-1984 FCC reports to contend that the FCC's underlying purpose for the continued deregulation of MATV systems was the fact that their "system size" rendered the cost of regulation excessive in terms of the benefits achieved. Br. at 22-24, discussing *1978* Report at 726. To parse a single paragraph which itself combines the reasoning set forth by the FCC for its various "system size/subscriber number" categories with the reasoning set forth by the FCC in the *1977* Report governing the commonly-owned exemption is to lend confusion where there is none in an obvious attempt to graft a *post hoc* justification onto FCC pronouncements that definitively present a wholly different purpose for the "commonly-

[footnote continued]

Again, the 1978 Report contains no analysis of whether any distinction was intended between MATV systems serving separately-owned (if such existed), as opposed to commonly-owned, dwellings and if so, the basis for such a distinction. The 1978 Report is also silent concerning any local regulatory nexus over MATV systems.

C. Had Congress Intended To Subject Larger Multichannel Video Programming Systems To Treatment As Cable Systems In Order To Benefit Consumer Welfare, Congress Would Have Included MMDS and DBS Systems Within The Definition Of A Cable System.

Congress could not have plausibly assumed that nonexempt SMATV facilities were larger than other video programming distributors left exempt from cable system regulation. It is undisputed that MMDS and DBS operators are not cable systems. J.A. at 8-11. Such systems are exempt even if separately-owned multiunit buildings are interconnected by the use of nonphysical wireless transmission. It is also undisputed that such operators either serve or have the capability to serve larger subscriber bases than the nonexempt SMATV facilities ever will serve.[22] These "legislative facts" directly contradict

owned" exemption than the fact that such systems were more likely than not "smaller" and thus more easily influenced by consumers. Clearly, the 1977 Report presents the most complete picture as to the FCC's deregulatory purpose behind this exemption.

[22]MMDS operators are entitled to serve on an interference protected basis all single family and multifamily properties falling within a 15-mile radius of their transmission facilities. *See* 47 C.F.R. 21.902(d)(1) (1991). DBS operators will be able to provide nationwide service. *In re Continental Satellite Corp.*, 4 F.C.C. Rcd. 6092 (1989). Since the 1984 Act, and known to Congress prior to passage of the 1992 Act, additional multichannel video distributors have been authorized which automatically serve larger subscriber bases than the nonexempt SMATV facilities and yet which are exempt from local regulation. *See Amendment Of Part 94 Of The Commission's Rules*, 6 F.C.C. Rcd. 1270 (1991).

the claim that Congress enacted the discriminatory classification as a means of protecting consumers from being "exploited" at the hands of an unregulated, larger supplier of multichannel video services. The absolute exemption for wireless systems, regardless of system size, proves that the congressional line-drawing contained in the 1984 Act was not based on a desire to treat all larger multichannel video programming distributors as cable systems for regulatory purposes.

Given such gross underinclusiveness, the Government suggests a *different* conceivable basis for discriminatory treatment of SMATV facilities interconnecting separately-owned buildings by wire and video facilities interconnecting such buildings by wireless transmission: "In fact, there is a rational basis for exempting wireless technologies *that has nothing to do with consumer protection*; Congress may have been trying to provide a deregulatory incentive to switch to such technologies." Br. at 28, n.23 (emphasis added). However, the assumption that SMATV facilities might switch to wireless technologies to avoid regulation as a cable system does *not* explain why Congress did not subject such wireless technologies themselves to similar regulation if Congress truly concluded that consumers of larger systems needed such protection.[23] Taken as a whole, the Government's attempt to attribute rationality relies on two contradictory bases: 1) Congress meant to

[23]The Government claims that Respondents' challenge to the discriminatory classification as between wired and wireless facilities serving separately-owned multiunit dwellings is not before this Court. The Government is in error. The fact that the court of appeals, having already invalidated the legislative classification, did not need to reach this additional discriminatory classification does not remove such classification from this Court's scrutiny. Respondents are entitled to defend the judgment below even on grounds not considered by the lower court. *See Dandridge v. Williams*, 397 U.S. 471, 475, n.6 (1970). In any event, such inquiry properly probes the "conceivability" of the "system size" rationale. *United States v. Speers*, 382 U.S. 266, 277, n.22 (1965).

impose regulation on larger systems; and 2) Congress meant to encourage those same larger systems to *evade* regulation by switching to wireless technology.

Congress' failure to treat such wired versus wireless systems equally cannot be brushed aside by a mere recitation to this Court's precedent holding that Congress may handle a problem one step at a time. What the Government fails to address is that the "step" it attributes to Congress is in the opposite direction of where federal policy is headed. The FCC preempted local regulation of wireless systems in 1978. *In re Orth-O-Vision, Inc.*, 69 F.C.C.2d 657 (1978), *recon. den'd*, 82 F.C.C.2d 179 (1980), *pet. for review den'd sub nom. New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982). Congress has chosen not to include MMDS in the cable system definition in the intervening 15 years, despite the passage of both the 1984 and 1992 Acts. In its Report, the FCC declined to offer any additional policy justifications for the discriminatory classification precisely because the FCC feared a step might be taken that would subject such wireless systems to regulation as cable systems, in contravention of what the FCC correctly characterized as congressional intent.[24]

Congress and the FCC have expressly determined that consumer welfare is best served by exempting these multichannel video programming systems from treatment as cable systems, no matter what their size. Again, either "system size" is not the rationale or the discriminatory classification is irrational as grossly underinclusive.

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[24] *See* Pet. App. at 48a-49a ("The majority implied that such a reasonable construction might take the form of including 'internal' systems within the definition of a cable system and thus subjecting them to local franchising requirements [citing the March 6 opinion at n.17 (Pet. App. at 31a-32a, n.17)] – a solution that would impose regulation on a class of systems that the Commission never has considered to be cable systems." *See also* Pet. App. at 50a.

D. Congress Has Consistently Sought To Rely On Marketplace Forces To Promote Consumer Welfare.

The Government's "consumer welfare" rationale is premised on an alleged congressional determination that regulation is the best means to protect the interests of consumers. Yet, in both the 1984 and 1992 Acts, Congress' primary goal is to rely on the marketplace, not regulation, to bring consumers diverse programming at the lowest possible rates with the best possible service.

The main impetus for passage of the 1984 Act was Congress' desire to rein in excessive local regulation found detrimental to the growth of the franchised cable industry. Congress was determined to foster competition between various suppliers of multichannel video services, finding regulation a poor substitute for free marketplace controls.[25] As discussed in Section IV, *infra*, the FCC, prior to 1984, had pursued a policy of preempting local regulation of MDS and SMATV systems on the grounds that local regulation was contrary to consumer welfare. *Orth-O-Vision; In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983) ("*ESCOM*"), *aff'd sub nom. New York State Comm'n On Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) ("*NYSCCT*"). In the 1984 Act, Congress expressly endorsed the FCC's

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[25] One of the express purposes of the 1984 Act is to "promote competition in cable communications." 47 U.S.C. §521(6). *See also* S. Rep. No. 67, 98th Cong., 1st Sess. 31 (1983) ("The Committee believes that the development of new technologies and the efforts of competitors seeking to respond to consumer demand will bring more services to the public than will administrative regulations."); H.R. Rep. No. 934, 98th Cong., 2d Sess. 22-23 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4659-60 ("National communications policy has promoted the growth and development of alternative delivery systems for these services, such as DBS, SMATV, and subscription television. The public interest is served by this competition, and it should continue.").

decision to preempt state regulation of "an SMATV system which does not use public rights-of-way." H.R. Rep. No. 934 at 63, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4700.

Despite its deregulatory intent, the 1984 Act still left unbridled discretion in the hands of local regulators as to how many cable systems would serve the community. In examining the video services marketplace post-passage, Congress and the FCC frequently found that a single, community-wide franchised cable operator had become entrenched and unresponsive to consumer demand, in large part due to exclusive franchising practices. In its 1990 Report to Congress on the state of competition, the FCC found that "[l]ocal franchising requirements often discourage and even forbid competition, for reasons that have little to do with appropriate governmental interests such as public health and safety, repair of public rights-of-way and construction performance." *In re Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 F.C.C. Rcd. 4962, 4973 (1990).[26] The FCC recommended that Congress limit the regulatory control of local franchising authorities. *Id.* at 4974.

In addition to finding that *local* regulation of traditional franchised cable systems had contributed to a *decline* in consumer welfare, the FCC continued pursuing the policy developed prior to the 1984 Act of preempting local regulation of new competitors entering the multi-

[26] Overbuilds, in which cable systems engage in direct head-to-head competition with one another, affect less than one percent of all cable systems. *Id.* at 5013. Among the factors cited by the FCC which contributed to the "relative paucity of successful competitive cable systems" were "restrictive requirements by franchising authorities (*e.g.*, universal service requirements), and . . . predatory activity by incumbents, as well as other advantages of incumbency." *Id.* Of course, the "restrictive requirements" that local authorities sought to place on second franchisees simply increased the ability of the incumbent to exploit its incumbency.

channel video services marketplace, finding that deregulation would best serve consumer welfare.[27] The FCC has adhered to this policy post-passage of the 1992 Act.[28]

Congress, meanwhile, recognized that exclusive franchising by local regulators has placed undue market power in the hands of the traditional cable industry which has been able to exploit local distribution monopolies by thwarting market entry by competitors[29] and subjecting consumers to substantial annual rate increases[30] and infer-

[27] *See, e.g., Amendment of Part 94 of the Commission's Rules*, 6 F.C.C. Rcd. 1270, 1271 (1991):

> [C]able systems possess a disproportionate share of market power and, therefore, are capable of engaging in anticompetitive conduct. [footnote omitted] In these circumstances, competition provides the most effective safeguard against the specter of market power abuse. As competition from alternative multichannel providers such as second competitive cable operators, wireless cable/multi-point distribution services, SMATV systems, and direct broadcast satellites (DBS) emerges, we find that it would serve the public interest to encourage these rival operators to enter the market and enhance their competitive potential.

[28] In authorizing development of the "local multipoint distribution service," the newest wireless technology capable of delivering video programming, the FCC again preempted local regulation in order to "further [its] goal of using the disciplines of the marketplace to regulate the price, type, quality and quantity of video services available to the public." *See Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration*, 5 Rad. Reg. (P&F) 71:133, 135 (current service) (1993).

[29] 1992 Act, §2(a)(2), 106 Stat. 1460:

> For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.

[30] *Id.*; S. Rep. No. 92, 102d Cong., 1st Sess. 7-8 (1991); H.R. Rep. No. 628, 102d Cong., 2d Sess. 30-34 (1992).

ior customer service.[31] Noting the FCC's finding that cable overbuilds exist in fewer than one percent of the markets, H. Rep. No. 628 at 45, Congress adopted the FCC's recommendation prohibiting the local imposition of restrictions that unreasonably discourage second franchises. 1992 Act, §7, 106 Stat. 1483.

The 1992 Act is in large part intended to restore the competitive balance between cable franchisees and their competitors so that consumers are no longer capable of being exploited by cable monopolies. Congress, in its Statement of Policy, reaffirmed its preference that competition, not regulatory intervention, promote consumer welfare.[32] Accordingly, a "principal goal" of the 1992 Act was "to encourage competition from alternative and new technologies, including competing cable systems, wireless cable, direct broadcast satellites, and *satellite master antenna television services.*" *Id.* at 27 (emphasis added). Congress chose not to impose local regulation on these "alternative" multichannel video distributors because of its determination that such distributors *must* keep rates low, service standards high, and programming diverse due to the extreme pressure brought to bear by the market power of the incumbent cable franchisee.[33]

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[31] S. Rep. No. 92 at 20-21.

[32] "It is the policy of the Congress in this Act to (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media; (2) *to rely on the marketplace to the maximum extent feasible, to achieve that ability. . . .*" 1992 Act at §2(b), 106 Stat. 1463 (emphasis added). *See* H. Rep. No. 628 at 30 ("[t]he Committee . . . strongly prefers competition and the development of a competitive marketplace to regulation"); *id.* at 34 ("a fully competitive marketplace ultimately will provide the most efficient and broadest safeguards for consumers").

[33] Indeed, perhaps the most controversial regultory aspect of the 1992 Act, rate regulation of cable systems, is applicable only to such systems which do not face "effective competition" from alternative sources of multichannel video programming, as defined by the Act. 1992 Act, §3, 106 Stat. 1464.

It has been congressional intent since the 1984 Act to rely as much as possible on market forces to foster competition and consumer welfare in the multichannel video marketplace. To the extent regulation has become necessary, it is the traditional community-wide cable systems which the FCC and Congress have recognized as being in need of restraint. Given Congress' overall deregulation approach, and its specific recognition of the need to encourage alternatives to traditional franchised operators, it strains credulity to suggest that Congress felt that, of all the possible targets, *non-monopoly* SMATV systems serving separately-owned multiunit dwellings, smaller than their wireless counterparts, were the facilities to be singled out for the purpose of advancing some generalized notion of consumer welfare.

IV. LIKE OTHER EXEMPT INTERSTATE MEDIA, NON-EXEMPT SMATV FACILITIES ADVANCE THE UNFETTERED DEVELOPMENT OF SATELLITE COMMUNICATIONS AND ARE LOCARED WHOLLY ON PRIVATE PROPERTY.

The FCC's cable system definition was intended to determine the extent of federal regulation to be applied, not whether localities possessed the authority to franchise interstate media of communications. The FCC decided questions of local jurisdiction instead through a series of preemption decisions.

In 1972, the FCC issued its seminal decision on cable regulation, including the degree to which local jurisdiction over cable systems would be tolerated despite the retention of exclusive federal jurisdiction over interstate media of communications. *Cable Television Report & Order,* 36 F.C.C.2d 143 (1972), *recon.,* 36 F.C.C.2d 326 (1972), *pet. for review den'd sub nom. ACLU v. FCC,*

523 F.2d 1344 (9th Cir. 1975).[34] The rationale for adopting such a "deliberately structured dualism" was the need for local involvement due to the use by traditional cable systems of the public right-of-ways: ". . . local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts." *Id.*, 36 F.C.C.2d at 207.[35] The FCC did not posit any theory in which local jurisdiction would be permitted to intrude upon federal control over inter-

[34]Through passage of the Communications Act of 1934, 47 U.S.C. §§151-712 (1988), Congress reserved to the federal government broad and exclusive authority to regulate interstate communications. Exclusive jurisdiction was asserted over

> all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission . . . .

47 U.S.C. §152(a) (1988). Even prior to the 1984 Act, it was held that Congress intended these "broad responsibilities" to encompass traditional cable television as well as other forms of interstate communications. *United States v. Southwestern Cable*, 392 U.S. 157, 177-78 (1968). The FCC has for almost 50 years preempted local jurisdiction over interstate communications. *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

[35]*See also In re Amendment of Part 76 of the Commission's Rules*, 54 F.C.C.2d 855, 861 (1975) (citation omitted):

> [I]t would be beneficial to clearly delineate those general aspects of cable regulation which we believe are in the province of this agency and those that are the responsibility of non-federal officials. The ultimate dividing line . . . rests on the distinction between reasonable regulations regarding use of the streets and rights of way and the regulation of the operational aspects of cable communications. The former is clearly within the jurisdiction of the states and their political subdivisions. The latter, to the degree exercised, is within the jurisdiction of this Commission. This is so because of the interstate nature of the medium as enunciated by the Supreme Court.

state media such as cable television based on the size or subscriber reach of that interstate media. The cable system definition itself was not mentioned. It merely appeared, with the same two exemptions, in the Appendix. *Id.* at 214.

As the FCC sought to protect local broadcasting service from the competitive inroads of cable television, local franchising authorities were actively protecting local cable service, whose revenues they shared, from the competitive challenges posed by new technologies. The nexus for such local regulatory authority was examined in the *Orth-O-Vision* and *ESCOM* cases. *Orth-O-Vision* dealt with MATV systems interconnected with MDS systems; *ESCOM* dealt with MATV systems interconnected with satellite dish technology ("SMATV").

In *Orth-O-Vision*, the FCC preempted local franchising regulation of MDS systems which installed no facilities in public rights-of-way and which were essential to the development of an interstate MDS network on a national scale. The FCC precluded the state agency from defining MDS-fed MATV systems as cable systems necessitating compliance with franchising requirements since any assertion of local jurisdiction over MATV systems forming an "integral" part of a "federally-regulated" portion of the interstate communications network" constituted "impermissible interference with interstate communications." 69 F.C.C.2d at 665-69.[36]

The FCC drew no distinction between a MDS-fed MATV system serving residents of commonly-owned as opposed to separately-owned multiunit dwellings for purposes of local regulation. Thus, the nature of the ownership or management of the property served was not the

[36]The state agency freely admitted its directive requiring those MATV systems receiving MDS signals to obtain a franchise was adopted to terminate such service in order to favor the development of cable systems. *Id.* at 662-63.

nexus chosen by the FCC to classify which MDS-fed MATV systems would be subject to local controls as cable systems. The nexus was whether the particular communications medium at issue was an *interstate* service which did *not* fit within the *single* exception to the FCC's retention of exclusive jurisdiction over all interstate media, *i.e.*, the placement of facilities necessary for the transmission of such interstate signals in the public rights-of-way.

In *ESCOM*, the FCC preempted local entry regulation of receive-only satellite antennas interconnected by wire with MATV systems in order to serve multiunit dwellings, as long as no public rights-of-way were used. The FCC rejected the argument that SMATV systems should be subject to the same dual regulatory approach applicable to traditional cable, despite the similarity between the two industries with respect to their use of *wired* technology:

> . . . [T] he Commission established this duality [with respect to traditional franchised cable television] *as a policy decision, rather than as a matter of law, based on franchised cable's use of the public streets and rights-of-way and the particular local interests considered applicable to a cable operator, generally chosen to serve the community as a whole.*

95 F.C.C.2d at 1234 (emphasis added).

The FCC reaffirmed the distinction it previously drew "between reasonable regulations regarding use of the public rights-of-way and the regulation of the operational aspects of cable communications," *Amendment of Part 76*, 54 F.C.C.2d at 861, reserving to itself regulation of the latter and permitting local entry regulation only in regard to use of the public domain. *ESCOM*, 95 F.C.C.2d at 1235. The FCC refused to permit local jurisdiction over such SMATV systems because of the threat such regulation posed to the federal government's own statutory mandate to advance the entry of diverse *interstate* media:

> State or local government regulatory control over, or interference with, a federally licensed or authorized interstate communications service, intentionally or incidentally resulting in the suppression of that service in order to advance a service favored by the state, is neither consistent with the Commission's goal of developing a nationwide scheme of telecommunications nor with the Supremacy Clause of the Constitution.

Id. at 1233.

The government interest in refusing to allow localities to treat SMATV systems as cable systems was to insure the free flow of nationwide interstate satellite signals.[37] Consistent with the FCC's decision concerning MDS systems, the FCC refused to permit local jurisdiction over *interstate* media which did not fit within the single exception to such exclusive federal control, *i.e.*, use of the public rights-of-ways. It is also crystal clear that the FCC's rationale for *retaining* exclusive jurisdiction over SMATV systems, *i.e.*, the protection of the FCC's open sky policy aimed at developing as many receive points as possible for the receipt of satellite signals, is substantially different from the FCC's rationale for *exempting MATV* systems from *federal* regulation, *i.e.*, a finding that regulation was unnecessary since no threat was posed to local broadcast service.

Upon judicial review of the *ESCOM* ruling *post-passage*

[37] *Id.* at 1230-1231 ("the unfettered development of interstate transmission of satellite signals, obviously dependent upon facilities for their reception is a federal concern of increasing significance to the public at large"); ("perceived public interest values associated with competitive, unregulated entry into the earth station ownership field"); ("avoidance of barriers to satellite reception . . . caused by state or local licensing or economic regulation of earth station receivers is a matter that will be of growing importance"); ("Commission has pursued open entry policies in the satellite field for the purpose of creating a more diverse and competitive telecommunications environment").

of the 1984 Act, the petitioners argued that the preemption of local franchising over MDS systems had no relevance to the FCC's decision to preempt local franchising over SMATV systems because of the technological differences between MDS, a "wireless" technology, and SMATV or traditional franchised cable, "wired" technologies. The D.C. Circuit rejected that contention by focusing on the "one critical" distinction between MDS and traditional franchised cable: MDS "is operated solely on private property and makes no use of public rights-of-way." *Id.* The D.C. Circuit found *no* pertinent distinction between MDS and SMATV, since both are operated wholly on private property, and in effect found that preemption of the former required preemption of the latter: "The Commission's preemption of [MDS], which, like the system involved in this appeal, does not use public rights-of-way, plainly refutes [the] contention that the Commission has arbitrarily reversed well-established policy." *Id.* at 811.

The exercise of exclusive federal jurisdiction turned not on the type of technology involved, *i.e.*, wired versus wireless, nor on the particular ownership or management of the buildings served, but rather on the wholly *interstate* nature of the particular communications medium at issue and the inapplicability to it of the "use of the public rights of way exception". *NYSCCT,* 749 F.2d at 808-09 (emphasizing "critical distinction the Commission has made between cable television systems that use public rights-of-way and systems, like SMATV, that are operated wholly on private property").

The FCC's pre-1984 Act policy with respect to local regulation of SMATV facilities begins and ends with *ESCOM* just as its pre-1984 Act policy with respect to local regulation of MMDS facilities begins and ends with *Orth-O-Vision.* Yet unlike *Orth-O-Vision* in which the FCC was silent concerning any decision to distinguish

between MDS systems serving commonly-owned versus separately-owned multiunit dwellings for regulatory purposes, the FCC in *ESCOM* specifically raised a question concerning this distinction, but refused to answer it.[38] The FCC was completely silent as to what basis might exist for distinguishing between SMATV systems serving commonly-owned versus separately-owned multiunit dwellings for regulatory purposes. Neither uses a public right-of-way for the delivery of interstate signals. Both advance the same federal interest in "the unfettered development of interstate transmission of satellite signals". *ESCOM,* 95 F.C.C.2d at 1230. Before the FCC could reach that question, the 1984 Act was passed.

Congress undoubtedly adopted the "deliberately structured dualism" developed by the FCC, including the FCC's decision to delegate regulation to local authorities only to the extent such regulation was related to usage of public rights-of-way. Congress repeatedly referenced traditional cable's use of the public rights-of-way as the sole nexus for permitting any degree of local regulatory jurisdiction over an interstate medium of communications.[39] The Senate Report quoted the FCC in concluding that the "ultimate dividing line" between federal and local jurisdiction "rests on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects

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[38] *ESCOM,* 95 F.C.C.2d at 1224, n.3 (equating *SMATV* with *MATV* for application of the heretofore MATV-only "commonly-owned" exemption and excluding from consideration in its preemption decision those SMATV systems interconnecting separately-owned multiunit dwellings by wire). Essentially, the FCC declined to issue a preemption decision beyond the facts of *ESCOM* which involved a SMATV system serving a single multiunit dwelling.

[39] There is absolutely no indication in the statutory language or legislative history of the 1984 Act that Congress subjected traditional cable systems to local regulation because of their system size as opposed to their use of the public domain.

of cable communications." S.Rep. No. 67 at 7, *quoting Amendment of Part 76*, 54 F.C.C.2d at 861. "The premise for the exercise of . . . local jurisdiction continues to be its use of local streets and rights of way." S.Rep. at 7. And the House Report stated that a facility serving multiple unit dwellings was exempt from local franchising, unless "such facility or facilities use a public right-of-way," H. Rep. No. 934 at 44, *reprinted in* 1984 U.S. Code & Admin. News at 4681, without regard to commonality of property ownership.[40] Even the discriminatory classification at issue here was edited by Congress to *add* the phrase "unless such facility or facilities uses any public right-of-way" to the FCC's existing "commonly-owned" exemption.

Until it agreed in conclusory fashion with Chief Judge Mikva's reasoning as set forth in his concurring opinion below, the FCC had never articulated a basis for its distinction between MATV systems serving commonly-owned as opposed to separately-owned dwellings or the engrafting of that classification upon the wholly new SMATV industry. Congress has never articulated a basis for retaining this same discriminatory classification in the 1984 Act. The "system size" rationale currently advanced by the Government was expressly rejected by Congress as a regulatory tool. The discrimination between

[40] The floor statements of individual members echo these conclusions. Senator Hollings, the ranking minority member of the Senate Commerce Committee, which oversaw the bill, stated in the floor debate: "No one can doubt that localities should be able to exert some control over cable because it crosses public rights of way." 84 Cong. Rec. S8320 (daily ed. July 14, 1983). Senator Packwood, the Committee's chairman observed: "Traditionally, the position of this country has been that local governments have no right to regulate communications. Cable is a form of communications. But for the sole reason that they have to string a wire, the Federal Government initially made a decision that they could regulate cable." 84 Cong. Rec. at S8314 (daily ed. June 14, 1983).

these two types of SMATV operators is arbitrary and irrational. Both are wholly interstate in nature and serve the same function of promoting the federal interest in the free flow of nationwide interstate satellite signals. Both can do so without use of the public rights-of-way.

Respondents submit that Congress did not realize it was establishing a discriminatory classification. Because the SMATV industry was in its infancy and because the *ESCOM* decision had only recently been issued, Congress likely was unaware that SMATV operators, ***unlike MATV*** systems, interconnected separately-owned dwellings by wire and yet remained wholly on private property in doing so. The FCC had not yet focused on the burgeoning SMATV industry; no comprehensive policy or rules existed for Congress' edification at that time. While the discriminatory classification does contain the phrase "under common ownership, control or management," the addition of the clause "unless such facility or facilities uses any public right-of-way" indicates Congress only meant to regulate as cable systems those interstate facilities using public property and unwittingly caught a different kind of fish in the regulatory net.[41]

[41] This is borne out by the FCC's own construction of the cable system definition immediately after passage of the 1984 Act. The FCC determined that *no* discrimination between SMATV facilities serving commonly-owned versus separately-owned buildings had been established by §602(6). *See supra* at 2-3.

V. ASSUMING ARGUENDO THAT CONGRESS' PURPOSE WAS TO ENSURE REGULATION OF LARGER SMATV FACILITIES, THE DISCRIMINATORY CLASSIFICATION IS NOT NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST NOT IS IT RATIONALLY RELATED TO THE PURPORTED GOAL.

A. Congress Could Not Have Plausibly Assumed That SMATV Systems Would Remain Of Smaller Size If A Franchise Requirement Were Imposed On Systems Seeking To Interconnect Separately Owned Buildings By Wire.

The Government posits that the discriminatory franchising classification "imposes a relative constraint upon the size of the market being served by the relevant SMATV facilities." Br. at 20. Yet this is contradicted by the very statutory scheme the Government seeks to uphold. First, under §602(6), a SMATV operator is entitled to install a separate satellite headend facility on the premises of each multiunit dwelling it seeks to serve without obtaining a franchise. In this "multidish" fashion, a SMATV operator can service the same number of separately-owned multiunit dwellings that could be serviced by the *same* operator via a coaxial cable interconnection. All the classification achieves is to increase costs which are passed on to consumers – hardly in their welfare.

Second, under §602(6), a SMATV operator is entitled to interconnect separately-owned multiunit dwellings by means of an "infrared link" without obtaining a franchise. *See* J.A. at 22-25. An infrared link involves a very low frequency microwave transmission that "hops" signals across a short distance of up to several feet. Again, through installation of infrared links, the "size of the market being served" by a SMATV operator will be identical to the market size of that *same* operator were a cable interconnection to be employed.

In light of these undisputed "legislative facts", Congress could not logically have presumed that its classification would in fact "impose a relative constraint" on the market share of SMATV operators. The classification simply does not achieve Congress' alleged purpose of subjecting all those SMATV systems of an unspecified and uncontrolled larger size to a franchising requirement for the alleged purpose of consumer protection.[42]

B. Consumers Have As Much Leverage Over Landlords Owning More Than One Building As They Do Over Landlords Owning Only One Building.

The Government claims it is reasonable to presume that the common ownership requirement "enhances" subscriber "leverage" because "all of the consumers will be able to use their status as unit owners or tenants to bring common pressure to bear on a single set of owners or managers who provide or purchase all of a facility's service." Br. at 20. This presumption defies common sense. Each resident has a single owner or manager to complain to concerning the services provided in that resident's building, regardless of whether that owner or man-

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[42] At this juncture, two other means have been authorized by the FCC for SMATV operator distribution of multichannel video programming to separately-owned multiunit dwellings. *See Amendment of Part 94*, 6 F.C.C. Rcd. at 1270 (SMATV operators may now use the 73 channels in the 18 GHz band for the delivery of video entertainment material without obtaining a local franchise, thereby serving an unlimited number of separately-owned multiunit dwellings from a single transmission point); *Telephone Company-Cable Television Cross-Ownership Rules*, 7 F.C.C. Rcd. 300 (1991), *recon.*, 7 F.C.C. Rcd. 5069 (1992) (authorizing tariffed common carrier service in which video program distributors lease channel capacity over optical fiber lines installed throughout the telephone company's local service area with no franchise obligation imposed upon channel lessees, thereby permitting interconnection of separately-owned multiunit dwellings from a single satellite headend facility through use of telephone lines even though SMATV operator cannot use its *own* coaxial cable to do so).

ager has ownership or managerial responsibility for additional buildings. Why an individual or group of tenants would have more control over a landlord owning a number of buildings than over a landlord owning a single building is left unexplained by the Government. Indeed, a tenant will have greater influence over a landlord owning but a single building than over a group building owner since the tenant's voice is less diluted. In short, whatever control the tenant possesses over the landlord or manager is simply unrelated to and unaffected by how large the SMATV operator is who services the property.

In turn, it is the owner of the particular property who determines whether a SMATV operator will be awarded a service contract over its competitors. An owner of a single building can exert as much control, for example, over the programming services offered, the subscriber rates charged, the quality of installation and degree of customer service provided as the owner of two commonly-owned buildings. A landlord has great bargaining power since a SMATV operator has no right to provide its video services to residents at all absent the permission of the property owner. Clearly, the landlord has an incentive to insure that tenants' needs are met by the SMATV operator since to do otherwise contributes to reduced occupancy and rental revenues. Should the SMATV operator fail to honor its contractual promises, owners possess the most effective consumer remedy available – expulsion from the building and renegotiation in the marketplace for a substitute provider.

Because a SMATV operator enters into separate individual contracts for each property served, the fact that those properties collectively are commonly- or separately-owned is irrelevant to the degree of control exercised by each separate landowner. The termination of a service contract by one landowner does not affect the continuation of another landowner's service contract. Thus, the

market size of a particular SMATV operator neither increases nor decreases the amount of leverage that any particular landowner might possess over such operator. That landowner can terminate the SMATV operator's access whether the property is serviced via a coaxial cable interconnection from another separately-owned building or by installation of an 18 GHz receiver or by an independent free standing satellite headend facility.

VI. SHOULD THE DISCRIMINATORY CLASSIFICATION BETWEEN SMATV FACILITIES PASS CONSTITUTIONAL MUSTER, THEN THIS COURT SHOULD RULE THAT §602(6) UNLAWFULLY DISCRIMINATES BETWEEN WIRED AND WIRELESS TECHNOLOGIES SERVING SEPARATELY-OWNED MULTIUNIT DWELLINGS.

The Government asserts without analysis that Congress discriminated between those video providers interconnecting separately-owned multiunit dwellings by wire versus wireless in order to provide an "incentive" to wired technologies to "switch" to wireless technologies. Br. at 28, n.23. As set forth by Respondents in their Br. in Opp. at 17-18, this justification flies in the face of "certain basic facts" that have dictated decades of congressional and administrative policy with respect to communications, foremost of which is that "the radio spectrum simply is not large enough to accommodate everybody." *National Broadcasting Co. v. United States,* 319 U.S. at 213. Respondents find it inconceivable that Congress crafted the cable system definition with the express purpose of encouraging traditional cable system operators to abandon their invested plant and migrate to wireless spectrum, especially when MDS spectrum, for example, provides a maximum of 33 channels. The discrimination between wired and wireless technologies serving separately-owned dwellings without use of the public rights-of-way is wholly irrational.

VII. THE COURT OF APPEALS ADHERED TO THIS COURT'S PRECEDENTS IN REJECTING THE RATIONALITY OF §602(6).

This Court has not abdicated its role in insuring that legislative classifications are premised upon a real rather than a feigned difference between two groups. To do otherwise endorses the exercise of raw power by the majority, and clothes naked preferences in the generalized garb of public welfare. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

As set forth above, there is no dissimilarity between SMATV operators located wholly on private property which seek to serve separately-owned as opposed to commonly-owned multiunit dwellings by wire. Nor is there any dissimilarity between wired and wireless video distributors who serve separately-owned multiunit dwellings. Perhaps this is why the Government challenges the process used by the lower court in rendering its decision more than it challenges the result.[43]

That process, however, correctly sought to uncover all "legislative facts on which the classification is apparently based." *Vance v. Bradley*, 440 U.S. 93 (1979).[44] *See* App.

[43] Regardless of the precise rationality review that might have been engaged in by the court of appeals, the result remains the same since the Government still has not articulated a conceivable basis for the discriminatory classification.

[44] The "discriminatory classification" upheld in *Vance* is not particularly instructive here. Congress distinguished between Foreign Service and Civil Service personnel in establishing a mandatory retirement age, not as between Foreign Service personnel. Here, Congress not only classified SMATV operators differently from MDS operators but also classified certain SMATV operators differently than other SMATV operators, apparently solely on the basis of the ownership of the real estate which such operators may serve. *See generally Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (overturning a classification distinguishing not [footnote continued]

at 36a. While the Government insists that the remand to the FCC, *in which even the dissenting judge concurred*, evidences a demand by the court of appeals for more than a "conceivable basis" that might justify the discriminatory classification, the very posture of the case compelled such a result and demonstrates a deferential move by the court to insure that the FCC had had a full opportunity to defend the challenged classification. Far from requiring "empirical proof" or an "articulated basis" in the record, the FCC was simply charged with a responsiblity to explain to the extent it could what "state of facts reasonably may be conceived to justify" the discriminatory classification.[45] Given the FCC's expert knowledge of the various multichannel video distributors at issue, how each operates and their relationship to one another, the court of appeals rightly assumed that if such a "state of facts" could be "conceived," the FCC was in the best position to do so, especially since the exemption at issue had been part of the FCC's own cable system definition prior to any congressional action. "The State must do more than justify its classification with a concise expression of an intention to discriminate." *Plyler v. Doe*, 457 U.S. 202, 227 (1982).

The lower court found the legislative history of the 1984 Act and FCC regulatory policy replete with references to the public rights-of-way rationale as the basis for local jurisdiction over interstate media and no reasoning

only between resident veterans and non-veteran residents, but also between resident veterans, solely on the basis of when such veterans moved into the state); *Zobel v. Williams*, 457 U.S. 55 (1982).

[45] *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990), quoting *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987). *But see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (law must "rationally further[ ] some legitimate, articulated state purpose"); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (law must rationally further "the purposes identified by the State").

as to how the discriminatory classification rationally furthered that interest. With respect to preemption of local regulation over SMATV facilities in particular, both the legislative history of the 1984 Act and FCC regulatory policy are silent concerning how the discriminatory classification furthers, rather than detracts, from the federal interest in the "unfettered development of interstate transmission of satellite signals."[46] In searching for a different governmental interest sought to be advanced by the classification, the court of appeals was met with assertions by the FCC that it agreed entirely with the public rights-of-way rationale but was hampered by "the unambiguous language of the statute." J.A. at 51a.[47] Clearly, the court

[46] "System size" was specifically *rejected* by Congress as a means to determine which interstate media were to be treated as cable systems, and was not the basis for the FCC's retention of exclusive jurisdiction over SMATV facilities serving commonly-owned multiunit dwellings.

[47] The FCC refused to describe for the court of appeals either what dissimilarities or similarities *could* be conceived to exist as between (1) the exempt and nonexempt video distribution facilities and (2) traditional cable systems, so as to justify local regulation of some but not all on a basis other than the historical public right-of-way rationale. Thus, the court was correct in concluding that the possible basis posited by Chief Judge Mikva, *i.e.*, "the impression of 'similarity' " between traditional cable systems and external, quasi-private SMATV facilities (necessarily assuming incorrectly a dissimilarity between traditional cable systems and either wholly private SMATV facilities or internal facilities) "is just that: a naked intuition, unsupported by conceivable facts or policies [citation omitted]." App. at 4a. *City of Cleburne*, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). *See also Plyler*, 457 U.S. at 228-30 (evidence of record demonstrated chosen means "ineffectual attempt" to further stated goal). *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 537 (1973) (overturning on equal protection grounds a legislative classification the practical effect of which did not operate rationally to further the stated government interest because the classification could be avoided by those whom the government intended to exclude from benefits by the classification.)

of appeals did not depart from this Court's precedents in determining that this case represented one of the rare instances in which Congress had engaged in a "wholly arbitrary act" in its classification scheme. *City of New Orleans v. Dukes*, 427 U.S. 297, 304 (1976) (per curiam).

This is not legislation which is merely "unwise" or "unartfully drawn". *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980). This is not legislation in which inequalities result from "transitional delay," but rather from a long-standing grossly overinclusive and underinclusive classification neither narrowly tailored to serve a compelling governmental interest nor rationally related to a legitimate federal goal. *See Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989). The court of appeals, consistent with this Court's precedents, simply refused to permit the rational-basis test to be deprived of all meaning, to become merely a "toothless" standard.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed. Since that judgment preceded passage of the 1992 Act, which exacerbates the discriminatory impact of the classification, and since there is no rational basis for the classification, Respondents request that this Court further declare that the burdens imposed on cable systems by the 1992 Act do not apply to SMATV systems interconnecting separately owned multiunit dwellings by wire. To the extent this Court finds that the record does not permit it to determine the validity of some or all of the restrictions contained in the 1992 Act, the case should be remanded to the court of appeals to permit Respondents to challenge the discriminatory classificaton based on the addi-

tional burdens imposed in the 1992 Act. *Diffenderfer*, 404 U.S. at 415; *Bryan v. Austin*, 354 U.S. 933 (1957).

In the alternative, Respondents request that this Court declare that Congress has adopted the result of the lower court's decision as to the franchising requirement and as to the burdens imposed by the 1992 Act.

Respectfully submitted,

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